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Six Summary Judgment Safeguards

Edward Brunet

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SIX SUMMARY JUDGMENT SAFEGUARDS

*Edward Brunet**

Summary judgment is under attack. Critics have called summary judgment unconstitutional, overused, a radical rule derived from more modest origins, and ineffectual. One rarely hears anyone willing to praise summary judgment. Existing summary judgment discourse appears moody and negative. Nevertheless, summary judgment provides numerous advantages and efficiencies. Summary judgment helps settlement chances by clarifying factual and legal issues and decreasing risk. A denial of the motion creates a settlement premium by increasing the costs and risk. In addition several “safeguards” exist that prevent erroneous grants of summary judgment. These safeguards include (1) the discretionary ability of the trial judge to deny summary judgment by identifying a single disputed factual issue; (2) robust de novo appellate review; and (3) a liberal ability to call a helpful “time-out” available under Rule 56(f) to take a focused quantum of discovery essential to combat a summary judgment request. Other potential safeguards, including (1) the weighing of inferences favoring the non-movant; (2) allowing the non-movant to introduce inadmissible evidence; and (3) a “handle with care” label applicable to only selected types of cases, work less well.

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I. INTRODUCTION

Summary judgment is under attack. Respected commentators and judges have criticized summary judgment in multiple ways. Professor Thomas argues that summary judgment is unconstitutional because it did not exist at common law and violates the historical test set forth textually in the Seventh Amendment.¹ Judge Patricia Wald worries that trial judges are too quick to grant summary judgment and that Federal Rule of Civil Procedure 56² “has assumed a much larger role in civil case dispositions than its traditional image portrays . . . to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake.”³ Professor Stephen Burbank describes the original 1938 Federal Rule 56 as a “radical transformation” of earlier versions of a much more confined procedure.⁴ Professor Schneider concludes that courts grant a disproportionate number of defendants’ summary judgment requests in cases raising gender discrimination.⁵

1. Suja A. Thomas, *Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139 (2007) (arguing that summary judgment conflicts with the common law axiom that the jury decides the facts); Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1667 (2008) (attacking articles seeking to defend the constitutionality of summary judgment). “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII.

2. Unless otherwise specified, this article refers to the current version of the Federal Rules of Civil Procedure, effective Dec. 1, 2009.

3. Patricia Wald, *Summary Judgment at Sixty*, 76 TEXAS L. REV. 1897, 1898 (1998). Accord, Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury From Political Power*, 33 S. ILL. L. REV. 469, 496-99 (2009) (setting forth litany of problems caused by overuse of summary judgment).

4. Stephen Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 591 (2004).

5. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 760 (2008). See also, Elizabeth M. Scheider, *The Changing*

Professor John Bronsteen delivered the ultimate criticism by strongly urging that summary judgment be eliminated and defending this revolutionary suggestion by asserting that the progress and settlement of civil litigation would be relatively unchanged by his proposal.⁶

Today's summary judgment discourse is moody and negative. Rarely is anything positive said about summary judgment.⁷ Nonetheless, summary judgment advances several important policies. Summary adjudication places proof responsibilities upon the parties in an efficient "put up or shut up" way.⁸ This summary judgment burden of production insures that only those cases with legitimate disputed issues of fact merit a trial and thereby conserves expensive and scarce trial and jury resources. The summary judgment process facilitates the identification of the issues in litigation and similarly aids the determination of the relevant legal rules to be applied.

Summary judgment also plays an important role in the desirable promotion of settlement. By focusing the parties' attention on the quality of the facts and law that supports a claim or defense, the availability of summary judgment makes the relevant facts and law less asymmetric and creates a more certain assessment of the strengths and weaknesses of a case.⁹ As the issues in a case become less risky, the chances of settlement increase.

Once a motion for summary judgment is made and denied, the settlement value for the non-movant generally is enhanced. This dynamic deters frivolous summary judgment motions by placing a risk of loss on the moving party. In a very real sense, the availability of summary judgment creates a "summary judgment premium" in a case in the form of increased risk of loss that will drive up the cost of settlement for the defendant who moves for summary judgment and raise potential settlement value for the nonmovant, usually the plaintiff. The existence

Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. PA. L. REV. 517 (2010).

6. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

7. *But see* David Rosenberg & Randy Kozol, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (recommending required Rule 56 motions to achieve more accurate settlements).

8. *See* Koszola v. Bd. of Educ. of City of Chi., 385 F.3d 1104, 1111 (7th Cir. 2004) (describing summary judgment as a "'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events."). *Accord*, Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 901 (7th Cir. 2003).

9. *See* EDWARD BRUNET, CHARLES CRAVER, & ELLEN DEASON, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* (3d ed. 2006) (positing that certainty and the lessening of risk facilitate settlement).

of this premium discourages the filing of weak summary judgment motions to avoid a summary judgment premium.

This article sets forth a more optimistic assessment of the current status of summary judgment. Numerous potential safeguards deter improper grants of summary judgment motions and serve to temper trial judges who are prone to rule favorably on summary judgment requests. While some of the safeguards act more as ineffectual clichés or slogans, others provide a set of significant deterrents to overly adventuresome treatment of Rule 56 motions. The goal of this article is to critique six possible summary judgment safeguards and, in so doing, to determine whether the state of contemporary summary judgment is as bleak as leading critics describe.

II. SUMMARY JUDGMENT IS INHERENTLY DISCRETIONARY BECAUSE OF THE POWER TO FIND A DISPUTED ISSUE OF FACT

Summary judgment is inherently discretionary. Despite the restoration of the mandatory “shall grant” language as part of the 2009 Amendments to Rule 56,¹⁰ the mechanics of summary judgment retain a giant dose of discretion for the trial judge. A Rule 56 motion must be denied if the trial court finds a single issue of disputed fact. This timeworn slogan vests a huge quantum of authority in the hands of a judge inclined to deny summary judgment.

The ease of denying a summary judgment motion through this technique is evident from decisions that emphasize the presence of just one disputed issue of fact. For example, in *Carerra v. Maurice J. Sopp & Son*, the court reversed a grant of summary judgment in a wrongful death and negligence case brought by pedestrians and their families against a truck service center following truck collision with pedestrians.¹¹ The court held a fact issue existed with regard to causation, and stated, “If *any* triable issue of fact exists, it is error for the trial court to grant a party’s motion for summary judgment.”¹²

10. Effective Dec. 1, 2010, FED. R. CIV. PRO. RULE 56(a) will read in relevant part, “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” COMM. ON RULES OF PRACTICE & PROCEDURE, JUD. CONF. OF THE U.S., PROPOSED AMENDMENTS OF CIVIL RULES 26 AND 56, at Rules Appendix C-6, -9, -25 (May 8, 2009) (Revised June 15, 2009) (hereinafter 2009 Amendments). See www.uscourts.gov/rule/newrules6.htm (confirming effective date of December 1, 2010). Stephen S. Gensler, *Must, Should, Shall*, 43 Akron L. Rev. 1141 (2010).

11. 99 Cal. Rptr. 3d 268 (Ct. App. 3d Div. 2009).

12. *Id.* at 276 (emphasis added). *Accord*, *Johnson v. United Cerebral Palsy/Spastic Children’s Found. of L.A. & Ventura Counties*, 93 Cal. Rptr. 3d 198, 208-19 (Ct. App. 3d Div. 2009) (reversing summary judgment in suit brought by former employee against former employer under

Numerous decisions reverse summary judgment and stress the need to do so because of the existence of a single issue of contested fact.¹³

The language of Rule 56 itself provides textual support for the presence of a degree of discretion to deny summary judgment. The Rule demonstrates the wide latitude afforded to a trial judge in denying summary judgment, including a minimal threshold requirement of finding even one disputed issue of material fact.¹⁴

Several recent decisions boldly assert that summary judgment is a discretionary mechanism. The Fifth Circuit expansively explains the district court's ability to deny summary judgment "even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before trial."¹⁵ Some courts appear to base this power upon the broad inherent authority to manage trial court pre-trial procedure.¹⁶

the California Fair Employment and Housing Act, holding a genuine issue of material fact existed as to whether employer's reason for firing pregnant employee was pretextual, and stating, "If . . . we find that *one or more* triable issues of material fact exist, we must reverse the summary judgment.") (emphasis added).

13. See, e.g., *Hayim Real Estate Holdings, LLC v. Action Watercraft Int'l, Inc.*, 15 So.3d 724, 728 (Fla. 3d Dist. Ct. App. 2009) (reversing summary judgment in action for breach of contract, fraudulent concealment, and nondisclosure brought by purchaser of commercial real property against seller, holding factual issue remained as to whether seller attempted to actively conceal known defects, and stating, "If the evidence raises the slightest doubt on any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it."); *Bond v. Giebel*, 787 N.Y.S.2d 512, 513 (App. Div. 2005) (affirming denial of summary judgment in action brought by snowmobiler against owner of parked vehicle to recover for injuries allegedly sustained during collision with vehicle, holding fact issue as to location of owner's vehicle at time of accident precluded summary judgment, and stating that "to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of *any* issue of fact.") (emphasis added; internal quotations omitted); *Slagle v. Hubbard*, 29 P.3d 1195, 1198 (Or. Ct. App. 2001) (reversing summary judgment in negligence action brought by injured passenger against minor driver and his parents, holding genuine issue of material fact existed as to whether drivers acted tortiously when they raced along highway, and stating that "there is at least a genuine issue of material fact concerning whether [the two minor drivers] acted 'in concert' with one another as they sped down [the highway].")

14. See FED. R. CIV. P. 56(g); FED. R. CIV. P. 56(h), 2009 Amendments, *supra* note 10, at Rules Appendix C-29-30.

15. *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989) (affirming trial court's denial of summary judgment in injury action based on the Jones Act and general maritime law).

16. See, e.g., *Hallwood Plaza, Inc. v. United States*, 84 Fed. Cl. 804, 811 (2008) (denying motion for summary judgment in action alleging breach of performance and lease agreement, and noting that "although summary judgment is designed to secure the just, speedy and inexpensive determination of every action, a trial court has the discretion to deny summary judgment if there is reason to believe that the better course would be to proceed to a full trial.") (citation omitted; internal quotations omitted); *Metric Constr. Co. v. United States*, 73 Fed. Cl. 611, 614 (2006) (denying summary judgment in construction contract dispute and stating that "even if the court is

Friedenthal and Gardner assert a clear Rule 56 basis for authority to deny summary judgment despite the absence of any disputed issues of material fact.¹⁷ They contend that discretion to deny is consistent with the intent of the 1938 original version of the rules and find support in the 1986 trilogy of summary judgment landmark decisions.¹⁸ Friedenthal and Gardner also base this discretion to deny in the nature of federal practice, presumably in the trial judge's inherent management powers.¹⁹

I see little in the 1986 trilogy to support such discretion to deny summary judgment.²⁰ Each of these three Supreme Court decisions upheld summary judgment and commentators stress the celebratory spirit of the Court regarding the important viability of the summary judgment weapon.²¹ These decisions focused on the mechanics of summary judgment by clarifying that a directed verdict standard governed Rule 56 motions and by forging a trial-like burden shifting dynamic that placed a light burden of production upon a movant that lacked the burden of proof at trial.²² Such mechanical norms have no discretionary elements and seem to undercut Friedenthal's and Gardner's thesis that the 1986 trilogy supports their discretion to deny position.²³

The alternative authority for discretion to deny advanced by Friedenthal and Gardner has merit. Much of the procedures and

convinced that the moving party is entitled to [summary judgment] the exercise of sound judicial discretion may dictate that the motion should be denied, and the case fully developed.") (quoting *McLain v. Meier*, 612 F.2d 349, 356 (8th Cir. 1979)); *U.S. Specialty Ins. Co. v. Skymaster of Va., Inc.*, 123 F. Supp. 2d 995, 998 (E.D. Va. 2000) (granting summary judgment to aviation insurer in dispute concerning pilot's misrepresentation of his medical condition to Federal Aviation Administration, but noting that a "trial judge has broad discretion to determine whether to deny [a] motion for summary judgment."); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1179-80 (Md. 1997) (suggesting, in action for declaratory judgment to determine whether a comprehensive general liability insurer had a duty to defend and indemnify the insured installer of insulation containing asbestos, that a court may deny summary judgment for several reasons, and that a court ordinarily possesses "discretion to refuse to pass upon, as well as discretion affirmatively to deny, a summary judgment request in favor of a full hearing on the merits; and this discretion exists even though the technical requirements for entry of such a judgment have been met.") (emphasis omitted).

17. Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 94-104 (2002).

18. *Id.* See *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

19. See Friedenthal & Gardner, *supra* note 17, at 99.

20. See *supra* note 18.

21. See, e.g., John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problem under Rule 56*, 6 REV. LIT. 227, 228-30 (1987) (stating that *Celotex* "signal[s] a significant change of attitude toward grants of summary judgment.").

22. *Id.* at 231.

23. See Friedenthal & Gardner, *supra* note 17, at 94-104.

philosophy of the 1938 passage of the Federal Rules of Civil Procedure smacked of equity and its primary tool, discretion.²⁴ The 1938 text was premised on a divide between mandatory “shall” rules and discretionary “shall” norms.²⁵ Not surprisingly, over time district judges made extensive use of their clear and purposeful discretionary powers and forged an equity-like “judicial management movement.”²⁶

III. “HANDLE WITH CARE” MANTRA: LEADING CASES CAUTION AGAINST GRANTING SUMMARY JUDGMENT IN PARTICULAR TYPES OF DISPUTES

The presence of leading decisions that preach and caution that summary judgment must be treated with special care in selected varieties of disputes has the potential for discouraging grants of summary judgment. Nonetheless, several problems plague this potential safeguard. First, the “Handle with Care” label lacks any textual support in Rule 56.²⁷ Second, this canon of summary judgment construction flies directly in the face of a transsubstantive interpretation of the Federal Rules of Civil Procedure.²⁸ Third, a warning or caution to take care when considering a summary judgment in a particular type of case is not a firm rule capable of certain and clear operation. Nevertheless, numerous decisions announce such a cautionary attitude in negligence, antitrust, and civil rights cases. Using powerful language, many cases seem to deny summary judgment on this basis.²⁹

24. See, e.g., Steven Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1989).

25. See Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 297-306 (1991).

26. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-78 (1982).

27. See FED. R. CIV. P. RULE 56; 2009 Amendments, Rules Appendix C-25-30.

28. “The Court has usually hewed to a ‘transsubstantive’ approach to the Federal Rules of Civil Procedure, construing and applying them uniformly without regard to the nature of a particular claim except where the Rules themselves specifically provide otherwise.” Harold S. Lewis, Jr., *Book II. Civil Rights Litigation: Practice and Procedure*, in STEPHEN YAGMAN & HAROLD S. LEWIS, *POLICE MISCONDUCT AND CIVIL RIGHTS: FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 12-100 (2d ed. 2002).

29. See, e.g., *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807, 813 (9th Cir. 2002) (reversing summary judgment in negligence action brought by injured longshoreman and asserting that “summary judgment is rarely granted in negligence cases because the issue of ‘whether the defendant acted reasonably’ is ordinarily a question for the trier of fact.”) (quoting *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 609 (9th Cir. 1990)); *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001) (affirming summary judgment in action alleging unlawful restraint of trade under the Sherman Act, but noting that “summary judgment is disfavored in complex antitrust litigation where motive and intent are important, proof is largely in the hands of the alleged conspirators and relevant information is controlled by hostile witnesses.”); *Forsyth v. Humana, Inc.*,

A. *Handle with Care in Antitrust*

An examination of such a cautionary attitude seems most idiosyncratic in antitrust litigation. After all, the reinstatement of summary judgment in *Matsushita* signaled that use of Rule 56 is both appropriate and available in antitrust disputes.³⁰ Leading commentators in the field of antitrust assert that courts have applied a “remarkably expansive” version of summary judgment in the antitrust field.³¹ The influence of *Poller v. CBS*, once a major impediment to granting a summary judgment in an antitrust case,³² appeared to be decreased substantially by a series of post-*Poller* decisions.³³

We currently live in an era in which the courts appear to support the use of summary judgment as a means to dispose of antitrust cases. I have recently asserted that “antitrust summary judgment is alive, diverse, and working.”³⁴ Summary judgment’s availability in antitrust litigation is essential because the possibility of obtaining treble damages and statutory attorney’s fees provides an incentive to file potentially equivocal claims.³⁵ Leading decisions regarding the use of antitrust summary judgment emphasize the transsubstantive nature of Rule 56³⁶

114 F.3d 1467, 1478 (9th Cir. 1997) (reversing summary judgment in action against insurer under the Employee Retirement Income Security Act (ERISA), the Sherman Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO), and asserting that “complex antitrust cases . . . invariably involve complicated issues of causation and damages,” and that the plaintiffs were “entitled to survive summary judgment on the issue of antitrust injury”).

30. 475 U.S. 574 (1986). See *supra* note 18 and accompanying text.

31. See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005).

32. 368 U.S. 464, 473 (1962) (using cautionary language regarding summary judgment in antitrust conspiracy cases and specifically stating that “summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot”).

33. See Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 507-513 (2009) (interpreting *Matsushita* as adopting the directed verdict test for summary judgment, eliminating the old “slightest doubt” standard, and displaying a willingness to use summary judgment in a case with a huge record). I concede that courts occasionally recite the *Poller* dictum as though it were contemporary gospel. See, e.g., *Indus. Burner Sys., Inc. v. Maxon Corp.*, 275 F. Supp. 2d 878, 882 (E.D. Mich. 2003) (asserting that “summary judgment should be used sparingly in complex antitrust litigation.”).

34. Brunet, *supra* note 33, at 513.

35. See, e.g., PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST LAWS* 79 (Aspen Publishers 2d ed. 2000) (1978)) (describing antitrust as a field in which there are “powerful incentives to offer claims or defenses of little merit.”).

36. See Robert Cover, *For James Wm. Moore: Perspectives on Reading the Rules*, 84 YALE L.J. 718, 718 (describing the transsubstantive idea as a system of procedural rules “generalized across substantive lines”).

and demonstrate a summary judgment norm of a generalized, uniform nature.³⁷

The post-*Matsushita* antitrust decisions emphasizing caution appear contrary to the spirit and mechanics of the 1986 trilogy.³⁸ Yet, the very existence of such cases demonstrates a degree of judicial uneasiness with granting summary judgment in antitrust litigation. Several themes resonate in these cases. Courts fear the complexity of disputes having a large factual record,³⁹ worry about the significance of issues of intent,⁴⁰ and seem uneasy with questions of credibility that often arise in antitrust litigation.⁴¹

37. See, e.g., *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (concluding that the non-movant's burden in an antitrust case is no different than in non-antitrust disputes); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (asserting that in "complex antitrust cases, no different or heightened standard for the grant of summary judgment applies").

38. See *supra* note 30 and accompanying text. See also *infra* notes 40-42.

39. See, e.g., *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996) (reversing summary judgment in antitrust action and noting that "because antitrust cases consist of primarily factual issues, summary judgment should be used 'sparingly.'"); *Bernstein v. Universal Pictures, Inc.*, 571 F.2d 976, 979-80 (2d Cir. 1975) (reversing dismissal of class action complaint alleging antitrust violations on ground that matter was within exclusive jurisdiction of National Labor Relations Board).

[D]ismissal was premature since issues of fact remain[ed] to be resolved, and . . . [e]ven where both parties may urge the absence of any material factual issues, [district judges have been] counselled (sic) to be cautious, lest haste to avoid a trial lead to premature resolution of contested matters . . . particularly in complex antitrust litigation, [where] although the benefits of avoiding a trial may be substantial, the courts have stressed the inappropriateness of deciding issues of fact before they have been fully developed.

Id. (internal quotations and citations omitted).

40. See, e.g., *Toscano v. Prof'l Golfers Ass'n*, 258 F.3d 978, 982 (9th Cir. 2001) (calling for summary judgment to be used sparingly in antitrust disputes because of presence of intent and motive questions); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 987 (8th Cir. 1982) (reversing summary judgment in suit brought by terminated distributor against manufacturer and wholesale dealer alleging conspiracy to terminate in violation of the Sherman Act and stating: "Summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue."); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980) (reversing summary judgment in suit brought by general aviation aircraft dealer against aircraft manufacturer based on alleged violations of Sherman Anti-Trust and Clayton Acts, and stating, "In considering the applicability of summary judgment to this case . . . we are not prepared to hold that the record is sufficiently clear and developed for us to make a determination one way or the other as to [the alleged conspiratorial motive and intent].").

41. See, e.g., *Welchlin, D.O. v. Tenet Healthcare Corp.*, 366 F. Supp. 2d 338, 351-52 (D.S.C. 2005) (pointing to a need to try complex antitrust cases to the jury because of the trial court's inability to weigh evidence when ruling on summary judgment).

B. *Handle with Care in Negligence Litigation*

Courts sometimes articulate a reluctance to grant summary judgment in cases involving negligence claims.⁴² This “handle with care” philosophy appears premised on the relative expertise of the jury and the court. Courts allocate negligence issues to the jury by reasoning that jurors possess special competence to decide matters of carelessness or breach of duty of care.⁴³ Rather than rely directly upon the Seventh Amendment’s⁴⁴ historical test,⁴⁵ this type of rationale focuses on relative skill, a division of labor that seemingly allocates decisional authority to the trial judge to decide questions of tort policy where consistency and complex issues of tort policy are dominant.

Leading commentators such as Professors Wright, Miller, and Kane appear to take a cautionary attitude toward using summary judgment in negligence litigation.⁴⁶ They explain that summary judgment “is not commonly interposed and even less frequently granted in negligence actions.”⁴⁷ They reason that this development is “not surprising” due to the “specialized function” of the judge and jury and the “particular deference . . . accorded the jury in such actions.”⁴⁸ Professor Moore takes a similar position, asserting that questions of negligence are “ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.”⁴⁹

42. *Paraskevaides v. Four Seasons Wash.*, 292 F.3d 886, 894 (D.C. Cir. 2002) (reversing summary judgment in suit against a hotel to recover the value of jewelry stolen from a hotel room, and holding issue of contributory negligence was a genuine issue of material fact “more appropriately resolved by a jury”); *Smith v. Selco Prods., Inc.*, 96 N.C. App. 151, 155-56 (1989) (reversing summary judgment in suit brought by injured worker against manufacturer, holding fact issue existed as to whether worker was contributorily negligent, and stating summary judgment is “rarely appropriate in a negligence case . . . because the determination of essential elements of these claims or defenses to these claims are [sic] within the peculiar expertise of the fact-finders”); *Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1316 (7th Cir. 1983) (reversing summary judgment for oil circuit breaker manufacturer in a negligence action and stating: “In negligence cases, questions concerning the reasonableness of the parties’ conduct, foreseeability and proximate cause particularly lend themselves to decision by a jury”).

43. *See, e.g., Selco Prods.*, 96 N.C. App. at 155-56.

44. *See supra* note 1.

45. *See generally* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in the Irrationality of Rational Decision Making*, 4 WM. & MARY BILL RTS. J. 407 (1995) (setting forth and critiquing the idea that the text of the Seventh Amendment requires procedures that were used “at common law.”).

46. *See* 10A FED. PRAC. & PROC. CIV. § 2729 (Charles Alan Wright, Arthur Rafael Miller, & Mary Kay Kane, eds., 3d ed. 2010).

47. *Id.*

48. *Id.*

49. § 56 Civil App. 200, *in* MOORE’S FEDERAL PRACTICE (3d ed. 2006).

The Supreme Court has endorsed the cautionary approach but only in a footnote containing a one-sentence dictum.⁵⁰

The “handle negligence summary judgment with care” position of Moore and Wright, and Miller and Kane, seems inconsistent with the presence of multiple negligence decisions granting or affirming summary judgment.⁵¹ Despite the existence of case law urging trial judges to be cautious when considering a motion for summary judgment in a suit involving claims of negligence, numerous decisions routinely grant summary judgment.⁵² An instruction to “use caution” when deciding a negligence case on summary judgment is not a rule in the form of a mandatory command. Rather, such a “handle with care” designation operates either as a slogan or an exhortation. The normal summary judgment standard applies to negligence and all other types of cases.⁵³ Provided that no reasonable jury could enter a verdict for the nonmoving party, summary judgment should be granted.

C. *Handle with Care in Civil Rights Litigation*

Courts also stress their reluctance to grant motions for summary judgment in cases presenting civil rights issues. Using a “handle with care” mantra, leading decisions of several circuits now assert that grants of summary judgment should be viewed with caution in civil rights claims.⁵⁴ Some opinions that express this position reason that the motive

50. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976) (observing in a case involving a construction of Rule 14a-9 of the SEC, the task of the jury in applying a “reasonable man” norm “is thought ordinarily to preclude summary judgment in negligence cases.”) (citing Wright, Miller & Kane, *supra* note 47).

51. See *supra* notes 47-50.

52. See, e.g., *Bultema v. United States*, 359 F.3d 379, 386 (6th Cir. 2004) (reversing summary judgment for defendant in a Federal Tort Claims Act case because of the presence of contradictory evidence regarding plaintiff’s contributory negligence and “it is the fact-finder’s duty at trial to weigh the evidence”); *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807, 813 (9th Cir. 2002) (reversing summary judgment in negligence action brought by injured longshoreman and asserting that “summary judgment is rarely granted in negligence cases because the issue of ‘whether the defendant acted reasonably is ordinarily a question for the trier of fact’”) (citing *Martinez v. Korea Shipping Corp.*, 903 F.2d 606, 609 (9th Cir. 1990)).

53. See *supra* notes 2, 29, and accompanying text.

54. See, e.g., *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (affirming preclusion of summary judgment on Rehabilitation Act claim, cautioning that summary judgment should seldom be used in employment-discrimination cases, and commenting that “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant”).

issues that recur in civil rights litigation are best decided by a jury that is more familiar with such questions than a judge.⁵⁵

Judge Posner explains his support for using caution in employment discrimination summary judgment assessments by characterizing the critical issue as involving credibility.⁵⁶ Similarly, Judge Jerome Frank pioneered an unwillingness to “pass on the veracity or credibility of witnesses” in overturning summary judgment for defendant Cole Porter in a copyright infringement suit.⁵⁷

To be sure, a host of summary judgment decisions expresses appropriate opposition to assessing witness credibility when deciding summary judgment motions.⁵⁸ However, disinclination to decide credibility questions, which occurs in a wide variety of cases and cannot be limited to civil rights disputes, fails to constitute a categorical rule. Consider Judge Posner’s assertion in a bankruptcy appeal that “credibility issues are to be left to the trier of fact to resolve on the basis of oral testimony except in extreme cases”⁵⁹ exhibits an efficiency voice. In “extreme cases” where, in Judge Posner’s terms, the evidence is “ridiculous” or “utterly implausible,”⁶⁰ a trial court should decide the issue by granting summary judgment. Moreover, it would appear more difficult to obtain summary judgment or a motion to dismiss using an “utterly implausible” approach than the current “plausibility standard.”⁶¹

Judge Posner’s thoughts on the “handle with care” approach are instructive. Judge Posner takes a transsubstantive position that there is no special rule precluding summary judgment in employment

55. See, e.g., *Allen v. Chi. Transit Auth.*, 317 F.3d 696, 699-700 (7th Cir. 2003) (Posner, J.) (stressing the need to leave witness credibility determinations to the jury in a Title VII case and reversing, in part, summary judgment).

56. *Id.*

57. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

58. See, e.g., *Scholastic, Inc. v. Harris*, 259 F.3d 73, 87 (7th Cir. 2001) (reversing in part summary judgment in a dispute regarding overtime pay, because the trial court’s refusal to admit deposition testimony was “an inappropriate resolution of a witness’ credibility”); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000) (reversing a grant of summary judgment because the district court improperly assessed credibility in an employment discrimination case).

59. *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (emphasis omitted).

60. *Id.* at 728-29. Judge Posner’s use of the word plausible was a full ten years prior to the adoption of a new standard of assessing whether a pleading is plausible in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) (using the word “plausible” or related words such as implausible nearly twenty times).

61. See generally Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010).

discrimination cases that involve intent.⁶² In *Wallace v. SMC Pneumatics, Inc.*, Judge Posner stated that “there is not a separate rule of civil procedure governing summary judgment in employment discrimination cases,” but rather courts should merely “be careful” when granting summary judgment in such cases.⁶³ This language would appear to caution district judges facing summary judgment motions in civil rights cases without forging a separate rule unsupported by the text of Rule 56. Judge Posner also noted by analogy that while early decisions pronounced antitrust law as a field inapt for summary judgment, more recent cases have repudiated that view.⁶⁴

Posner appears to be warning judges and litigants that discrimination cases raise difficult summary judgment questions. His act of raising a cautionary yellow flag relies on a nuanced reading of the rules of procedure. Rather than create a heavy handed interpretation of Rule 56, Judge Posner relies on subtle dicta to signal his “handle with care” position.⁶⁵ Judge Posner provided a forthright efficiency rationale by asserting that the “drift in many areas of federal litigation toward substitute summary judgment for trial” was a byproduct of an expanding federal caseload.⁶⁶

IV. THE RULE 56(F) TIME-OUT SAFEGUARD

The presence of the motion by the non-movant for additional time to take discovery operates as a request for a time-out from the pending summary judgment process. As currently interpreted the Rule 56(f) time-out motion⁶⁷ constitutes a legitimate safeguard that prevents premature and potentially erroneous grants of summary judgment.

62. See *Chavin*, 150 F.3d at 728-29 (holding that the defendant in a bankruptcy case fits into the exceptional “utterly implausible” category where the judge need not defer to the trier of fact to resolve the credibility issue).

63. 103 F.3d 1394, 1396 (7th Cir. 1997).

64. *Id.*

65. See *id.*

66. *Id.* at 1397. See also Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 997-1000 (2004) (calling for a strong judicial presence in the administration of antitrust and other similarly complex cases that apparently would require a particularized treatment of the Rules in such cases).

67. FED. R. CIV. P. 56(f).

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

Id.

Most circuits assert that the non-movant's Rule 56(f) request should be readily available and liberally activated.⁶⁸ As aptly stated by one decision, "Rule 56(f) is intended to safeguard against judges swinging the court's summary judgment axe too hastily."⁶⁹ Timing the assessment of summary judgment in relation to whether the nonmoving party has had a fair opportunity to discover facts needed to defeat a Rule 56 motion constitutes the critical and necessary balance to this safeguard.⁷⁰

Justice Rehnquist emphasized the significance of Rule 56(f) to even-handed and efficient administration of summary judgment in his *Celotex* opinion where he asserted that Rule 56(f) prevents the non-movant from being "railroaded."⁷¹ In *Celotex*, Justice Rehnquist commented, "Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery."⁷² This language is clearly designed to prevent premature grants of summary judgment because of its reference to delaying or continuing the Rule 56 motion and its notable insistence on "an opportunity to make full discovery."⁷³ Lower courts now refer to

68. See, e.g., *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) (holding district court's denial of plaintiff's motion for additional discovery was abuse of discretion); *Doe v. Abington Friends School*, 480 F.3d 252, 257 (1st Cir. 2007) (holding district court prematurely granted summary judgment without allowing further discovery and stating,

District courts usually grant properly filed Rule 56(f) motions as a matter of course. . . . If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion. . . . And whatever its decision, it is "improper" for a district court to rule on summary judgment without first ruling on a pending Rule 56(f) motion.

Id. (internal quotations and citations omitted)). See also *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006) (holding district court abused its discretion by un-filing plaintiffs' first motion to extend time to respond to defendant's summary judgment motion and stating, "[Rule 56(f) motions] are broadly favored and should be liberally granted.").

69. *Resolution Trust Corp. v. N. Bridge Assocs., Inc.* 22 F.3d 1198, 1203-08 (1st Cir. 1994) (holding district court abused its discretion in denying movants' third Rule 56(f) motion in response to "protracted dawdling" by a "recalcitrant opponent" and stating: "We do not believe it is either necessary or desirable for a court to attempt to probe sophisticated issues on an undeveloped record").

70. See generally Edward Brunet, *The Timing of Summary Judgment*, 198 F.R.D. 679 (2001).

71. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (footnote omitted).

72. *Id.* See also *Jade Trading, LLC v. United States*, 60 Fed. Cl. 558, 565 (2004) (granting motion for denial of plaintiffs' motions for summary judgment in a suit against the United States seeking readjustment of partnership items on a partnership income tax return and noting that a party "cannot be deprived of the discovery needed to place at issue material factual questions in opposition to the motion [for summary judgment]" because "[t]hat is the safeguard to which Rule 56(f) is directed").

73. *Celotex*, 477 U.S. at 326.

summary judgment being proper only after the nonmoving party “has had adequate time for discovery.”⁷⁴

The strong nature of the Rule 56(f) safeguard can be seen by examination of the requirement for the non-movant’s affidavit as a mandatory precondition for a time-out. The text of Rule 56 clearly requires the nonmoving party who seeks a continuance to file an affidavit explaining how additional discovery will cause denial of summary judgment.⁷⁵ Despite a certain textual need for a non-movant affidavit, decisions overlook this formal mandate,⁷⁶ and in so doing, signal the liberality of the time-out procedure. The decisions that overlook the need for an affidavit demonstrate a willingness to substitute some alternative promise from the non-movant or its counsel that a continuance will reveal facts supporting denial of summary judgment.

74. See, e.g., *Nooner v. Norris*, 594 F.3d 592, 599 (6th Cir. 2010) (concluding that non-movant group of inmates were given an adequate “time to conduct discovery” and affirming grant of summary judgment in a 1983 case).

75. “If a party opposing the motion shows *by affidavit* that, for *specified reasons*, it cannot present facts essential to justify its opposition . . .” FED. R. CIV. P. 56(f) (emphasis added).

76. See, e.g., *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246 (4th Cir. 2002) (reversing district court’s grant of summary judgment to six defendants in domain name dispute and holding that “the purposes of Rule 56(f) were served” despite non-movant’s failure to file a Rule 56(f) affidavit, because non-movant explained to the district court, orally and in writing, that more discovery was needed); *St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1314 (3d Cir. 1994) (reversing summary judgment in suit against newspaper for defamation of public figure and stating: “Although we again emphasize the desirability of full compliance with Rule 56(f), failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration.”) (internal citations omitted); *Dean v. Barber*, 951 F.2d 1210, 1214 n.3 (11th Cir. 1992) (reversing grant of summary judgment despite lack of affidavit under Rule 56(f) where non-movant “complied with the Rule’s requirements by expressly bringing to the district court’s attention . . . that discovery was outstanding” and requesting a continuance); *Int’l Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1266-67 (5th Cir. 1991) (reversing summary judgment in action alleging tortious interference by competitor against corporate owner of fast food restaurants).

The proper but not only way of requesting additional time for discovery is for the nonmoving party to [submit an affidavit]. The nonmoving party’s failure to tailor its request for additional discovery to fit Rule 56(f)’s precise measurements does not necessarily foreclose the court’s consideration of the request. Although the preferred procedure is to present an affidavit . . . so long as the nonmoving party indicates to the court by some equivalent statement, preferably in writing of its need for additional discovery, the nonmoving party is deemed to have invoked the rule.

Id. (internal quotations omitted). See also *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988) (“[A] party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to invoke the protection of that Rule.”); *First Chi. Int’l v. United Exchange Co.*, 836 F.2d 1375, 1380-81 (D.C. Cir. 1988) (choosing “flexible approach” of not requiring an affidavit in order to obtain additional time for discovery and to extend time for deciding summary judgment).

For example, a letter or even an oral statement by counsel to the trial court serves the same purpose as a Rule 56(f) affidavit.⁷⁷

One future problem with the time-out request is its possible overuse in the wake of the need to plead “plausible” facts. Future plaintiffs who face motions to dismiss governed by *Ashcroft v. Iqbal*⁷⁸ are likely to seek a similar but unregulated time-out to seek discovery essential to defeat a Rule 12(b)(6) request.⁷⁹ Such new and earlier requests might cause a similar but later Rule 56(f) request to appear redundant. The need for a time-out at two key early decision stages could cause undesirable competition and Rule 56(f) to atrophy.

V. THE WEIGH INFERENCES IN FAVOR OF THE NON-MOVANT SAFEGUARD

Many summary judgment decisions emphasize that the trial judge should weigh factual inferences in favor of the nonmoving party.⁸⁰ In *United States v. Diebold, Inc.*,⁸¹ the Supreme Court endorsed this summary judgment corollary when it reasoned that “the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.”⁸² Although this proposition may act as a safeguard to prevent unjustified grants of summary judgment, its ambiguity and overstated nature prevent its reliability. Judge William Schwarzer views the *Diebold* dicta to be “much broader than necessary for the decision” and concludes that it “cannot be

77. See, e.g., *Harrod's Ltd*, 302 F.3d at 246 (permitting an oral statement to suffice); *Int'l Shortstop, Inc.*, 939 F.2d at 1266-67 (allowing a writing to substitute for a formal affidavit).

78. 129 S. Ct. 1937 (2009).

79. See generally Suzette Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (suggesting that courts use narrow and focused discovery to determine plausibility at the pleading phase of litigation); Scott Dodson, *Federal Pleading and State Pretrial Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010) (exploring pre-suit discovery and focused, particular efforts to obtain discovery early in litigation in the wake of *Twombly* and *Iqbal* decisions).

80. See, e.g., *Crowe v. County of San Diego*, 593 F.3d 841, 862 (9th Cir. 2010) (noting that “all justifiable inferences are to be drawn in favor of the [non-movant] plaintiffs.”); *Galvez v. Bruce*, 552 F.3d 1238, 1241 (11th Cir. 2008) (asserting that “all reasonable doubts about the facts should be resolved in favor of the non-movant.”) (quoting *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999)); see also *TLT Const. Corp. v. RI, Inc.*, 484 F.3d 130, 138 (1st Cir. 2007) (reversing summary judgment in a contract dispute because trial judge did not properly weigh inferences in favor of the non-movant).

81. 369 U.S. 654 (1962).

82. *Id.* at 655.

accepted uncritically.”⁸³ In truth, the maxim that the trial judge should weigh inferences in favor of the non-movant is easy to assert but, in practice, difficult to implement effectively.

Several problems plague this possible summary judgment safeguard. First, the singling out of inferences is problematic. Influential judges have asserted that “all evidence is inferential.”⁸⁴ This would appear to make this axiom unworkable. Professor Duane has persuasively argued that there is no distinction between inferences and testimony.⁸⁵ Confusion over the very meaning of this concept prevents it effectiveness.⁸⁶

Second, this alleged “safeguard” is easy to say but difficult to carry out. This generalization has been made redundant by use of the directed verdict standard that now governs the entirely appropriate adage that judges should not weigh evidence when assessing summary judgment mechanics.⁸⁷ A trial judge worried about improperly weighing the evidence, a process left to the jury, may not be keen to weigh inferences in favor of the party moved against, but should grant summary judgment whenever a reasonable jury could not find for the non-movant.

Moreover, the process of weighing inferences is a tricky concept in summary judgment. Before such weighing can occur, the court must be certain that a choice of inferences actually exists.⁸⁸ When the evidence is so one-sided that no reasonable jury could find for the nonmoving party, there is no legitimate choice of inferences and the alleged safeguard to weigh inferences in favor of the non-movant fails to apply.⁸⁹

The act of tilting inference weighing appears to be less of a rule of law and more of a difficult-to-apply procedure that is hemmed in by more powerful summary judgment norms. As aptly articulated by the First Circuit, such inference weighing is an “indulgence . . . bounded by the party’s obligation to support the alleged factual controversy with

83. William W. Schwarzer, *Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 478 (1984).

84. *See, e.g., In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (Posner, J.).

85. *See* James Joseph Duane, *The Four Greatest Myths about Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1562-76 (1995).

86. *See generally id.*

87. *See* EDWARD BRUNET & MARTIN H. REDISH, § 6.5 SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 153-58 (3d ed. 2006).

88. *See, e.g., Hells Canyon Pres. Council v. U.S. Forest Serv.*, 883 F. Supp. 534, 537 (D. Ore. 1995).

89. *See id.*

evidence that is neither ‘conjectural nor problematic.’”⁹⁰ We are sure to see this homily often but unlikely to consider it a legitimate summary judgment safeguard.

VI. *DE NOVO* APPELLATE REVIEW PROVIDES A MODERATE SAFEGUARD

Hands-on *de novo* review of summary judgment grants provides a safeguard of moderate strength.⁹¹ Every federal circuit purports to review grants of summary judgment using a robust scope of *de novo* review.⁹² The certainty of second look at a trial court summary judgment operates to curb overenthusiastic use of Rule 56 and represents a significant force to correct trial level errors in summary judgment mechanics.⁹³ *De novo* review operates as a helpful deterrent to erroneous summary judgment decisions “in the wings” of the operational market for the production of summary judgment just as a potential competitor at the edge of a competitive market can play a helpful role to preserve competition.⁹⁴ This deterrence effect operates silently and without citation; every trial judge knows that she can be reversed for granting summary judgment far more readily than when denying a Rule 56 request.

For the most part, analysis of purported *de novo* review reveals a detailed evaluation of the summary judgment record and an appropriate non-deferential review of the trial judge’s ruling.⁹⁵ However, the considerable expense demanded by the hands-on nature of *de novo* review diminishes the potential breadth of this safeguard. Relatively

90. *Chiang v. Verizon New England, Inc.*, 595 F.3d 25.34 (1st Cir. 2010) (quoting, in part, *Nat’l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

91. “Under this standard of review the reviewing court will analyze the evidence and only permit summary judgment to be affirmed where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” *BRUNET & REDISH*, *supra* note 87, at 447.

92. *See, e.g.*, Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 *HOFSTRA L. REV.* 91, 112 (2002) (stating: “The law is well-settled that an appellate court will review the grant of a motion for summary judgment *de novo*”).

93. *See* *BRUNET & REDISH*, *supra* note 87, at 447.

94. *See, e.g.*, *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973) (adopting a rational beer merchant test to determine if Falstaff Brewing was really perceived as a competitive influence at the edge of a geographic market); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (concluding that attempted acquisition of Pacific, a firm at the edge of the California natural gas market, made Pacific a competitive factor and led court to find a violation of the antitrust laws).

95. *Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145, 152 (1st Cir. 2009) (reversing summary judgment in action brought by employee against former employer and manager under state anti-discrimination statute and stating: “This court’s review of the district court’s grant of summary judgment is *de novo* and not deferential.”) (internal quotations omitted).

few cases are reversed following *de novo* review.⁹⁶ For this idea to thrive as a safeguard, the deterrence concept set forth above needs to work its magic.

Moreover, the empirical support for relying on this safeguard appears shaky. The high cost of appeals and the difficulty of obtaining reversal mean that relatively few cases will get appealed. Modest quantities of summary judgment appeals suggest that the reported case law fails to reflect a representative set of issues. The few reported appellate opinions constitute the proverbial tip of the iceberg and are unreliable predictors. Although a Federal Judicial Center study of Second and Ninth Circuit appeals in civil cases reveals a 19 percent reversal rate for grants of summary judgment and a 15 percent reversal rate for all civil cases, this difference was not deemed significant and the overall rates termed comparable.⁹⁷

Several decisions warn that the appellate court will not “mine the record” in search of issues of fact for trial.⁹⁸ Such statements represent admonitions to counsel’s duty to provide proper citations to the record and should not be considered unwillingness to provide *de novo* judicial review. *De novo* review fails to relieve counsel of its obligations to direct the factual disputes to the attention of the court of appeals.

VII. CUTTING EVIDENTIARY SLACK TO THE UNDERDOG BY ALLOWING THE NON-MOVANT TO INTRODUCE INADMISSIBLE EVIDENCE

In an ambiguous and potentially misleading passage of *Celotex v. Catrett*, Justice Rehnquist asserted that the non-movant’s evidence need not be in admissible form.⁹⁹ Although this broad statement appears to be dicta, the evidence advanced by the non-movant plaintiff Catrett included a letter written by, Mr. J.R. Hoff, the Assistant Secretary of Anning-Johnson, Catrett’s former employer, confirming that Catrett was exposed to the Celotex product Firebar during his period of

96. BRUNET & REDISH, *supra* note 87, at 451. “[A] collection of information analyzed by the Federal Judicial Center concludes that ‘a perception that summary judgments are reversed at a higher rate than decisions in other civil cases does not appear to be supported by the available data.’” *Id.*

97. See Joseph Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, 1 FJC DIRECTIONS 11, 15 (1991) (analyzing 1987 to 1989 data).

98. See, e.g., *Gilbert v. Des Moines Area Community College*, 495 F.3d 906, 915 (8th Cir. 2007) (asserting that, according to circuit “standard practice,” courts of appeals will not mine the record looking for nuggets of factual disputes and affirming summary judgment in a race discrimination and retaliation case brought by former provost of college).

99. 477 U.S. 317, 324 (1986) (“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”).

employment.¹⁰⁰ This letter was hearsay at the summary judgment stage, but was fully capable of later upgrading in admissibility status at trial.¹⁰¹ The ultimate denial of summary judgment in *Celotex* by the D.C. Circuit relied on this theory with Judge Robert Bork asserting that the Hoff letter could not be considered in the summary judgment record because it amounts to hearsay.¹⁰²

Of course, there is no FRCP textual support for the cutting of evidentiary slack to a summary judgment non-movant. Nevertheless, some decisions liberally follow Justice Rehnquist's proposition despite Rule 56(e)'s requirement that affidavits meet admissibility standards.¹⁰³ The key word in Justice Rehnquist's potential evidentiary safeguard is "form."¹⁰⁴ The word "form" provides an opportunity to preserve a definitive ruling on admissibility of the non-movant's materials and essentially permits the trial judge to predict whether the proffered evidence can become admissible by the time of trial.¹⁰⁵

While it is possible to argue that the majority intended to generally exempt the non-movant's proof from admissibility, it seems unlikely that Justice Rehnquist desired a broad exemption from the Federal Rules of Evidence. Professor John Kennedy's assertion that "Justice Rehnquist still meant to say that in any event the content must be admissible" rings true.¹⁰⁶ Essentially this is a form-content theory with the non-moving party able to advance evidence in inadmissible form provided that the content of the summary judgment be capable of admission later at trial.

100. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 35, 37 (D.C. Cir. 1987), *rev'd sub nom.*, *Celotex v. Catrett*, 477 U.S. 317 (1986).

101. *Id.* at 37 (considering the Hoff letter despite admissibility problems).

102. *Id.* at 42 (Bork, J., dissenting).

103. *See, e.g.,* *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) (permitting the non-movant to submit affidavits containing hearsay "on the theory that the evidence may ultimately be presented at trial in an admissible form."); *Waldrige v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (concluding that a non-movant "need not tender evidence in a form that would be admissible at trial," but qualifying this assertion by stating that "of course, the evidence set forth must be of a kind admissible at trial"); *McMillan v. W. E. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996), *aff'd*, 520 U.S. 781 (1997) (noting that *Celotex* was "simply allowing otherwise admissible evidence to be submitted in inadmissible form at the summary judgment stage, though at trial it must be submitted in admissible form" and insisting on some proof that hearsay would be capable of admission by trial). *Contra* *Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1210 (10th Cir. 2010) (reading Rehnquist dicta as still requiring rejection of hearsay evidence advanced by the nonmovant and affirming summary judgment for defendant in a workplace discrimination case).

104. *Celotex*, 477 U.S. at 324. *See supra* note 95.

105. *See* BRUNET & REDISH, *supra* note 87, at 225-27.

106. Kennedy, *supra* note 21, at 239.

Some decisions appropriately reject the non-movant's proof as inadmissible because it appears incapable of becoming admissible later at trial.¹⁰⁷ Consider Judge Posner's refusal to consider a hearsay statement advanced by the non-movant in *Eisenstadt v. Centel Corp.*¹⁰⁸ The hearsay evidence offered was an article from the *Chicago Tribune*.¹⁰⁹ Judge Posner stated that because the article was not being attested, and that plaintiffs could easily have obtained the reporter's affidavit, it was not admissible in summary judgment proceedings¹¹⁰ to identify the affiant and failed to list the affiant in a pre-trial list of witnesses.

Other decisions generally mandate all summary judgment evidence to be of the type admissible at trial.¹¹¹ These decisions advance a clear and sensible policy of basing summary judgment dispositions upon trustworthy and reliable evidence and, for these reasons, merit praise.

Several decisions seem to consider inadmissible evidence of the non-movant without any analysis of its capability of admission into evidence at trial. For example, in *Bushman v. Halm*,¹¹² the court asserted that the nonmoving party "is not obligated to produce rebuttal evidence which would be admissible at trial" and considered a doctor's report in ruling on summary judgment.¹¹³ While these decisions aid the non-movant, they interject unreliability into the summary judgment process and seem beyond the analysis advanced in *Celotex*.¹¹⁴ While Justice Rehnquist's dictum appears to lack support in the text, its spirit

107. See, e.g., *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997).

108. *Id.*

109. *Id.* at 742.

110. *Id.* See also *Hardrick v. City of Bolingbrook*, 522 F.3d 758, 761, 764 (7th Cir. 2008) (reversing summary judgment in a civil rights claim involving alleged use of unreasonable force and rejecting district court finding that non-movant's answers to interrogatories were hearsay); *Cooper-Schut v. Visteon Auto. Sys.*, 361 U.S. 421, 429 (7th Cir. 2004) (affirming summary judgment for defendant former employer in a Title VII class brought by a former employee and rejecting affidavit proof proffered by the non-movant plaintiff because proof of non-movant failed to meet Rule 56(e)).

111. See, e.g., *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (concluding that the materials opposing summary judgment must be those that would be admissible at trial); *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 723 (8th Cir. 2003) (rejecting non-movant's testimony as speculative and vague and concluding that "inadmissible evidence obtained in discovery cannot be used to defeat" summary judgment); *Ambrose v. New England Ass'n of Schools & Colleges, Inc.*, 252 F.3d 488, 497 (1st Cir. 2001) (asserting that "[w]arding off summary judgment requires non-movants to provide materials of evidentiary quality").

112. 798 F.2d 651, 654-56 (3d Cir. 1986).

113. *Id.* Accord, *O-So Detroit v. Home Ins. Co.*, 973 F. 2d 498, 505 (6th Cir. 1992) (considering affidavit of the non-movant without analysis of its admissibility at trial).

114. See *supra* notes 19, 22, 72-74, 95-96, 99-100 and accompanying text.

supports admitting only that evidence that would meet admissibility rules.¹¹⁵

VIII. CONCLUSION: RE-EVALUATING SUMMARY JUDGMENT SAFEGUARDS

This article looks at summary judgment in a positive manner. Summary judgment, when appropriately applied, is plainly constitutional and patently efficient in its ability to conserve scarce jury and judicial resources. The availability of summary judgment helps to define the facts and to focus the disputed factual issues. Such clarification of facts and law makes the case's outcome more probable, a dynamic that enhances settlement prospects by increasing certainty. At the same time, the existence of a settlement premium may up the ante for the non-movant because the denial of a summary judgment motion increases the risk of loss for the movant and puts the non-movant one step closer to an expensive trial process. The existence of the settlement premium deters the filing of questionable or frivolous Rule 56 motions and means that a motion should not be filed without a reasonable chance of success.

Nevertheless, summary judgment is capable of misuse and misapplication. Several so-called safeguards facilitate fair and even-handed application of summary judgment and serve to decrease erroneous grants of summary judgment.

This article evaluates six possible summary judgment "safeguards." I conclude that several possible safeguards are effective at deterring misuse of Rule 56 motions. The trial judge's inherent ability to find just one genuine issue of disputed fact operates as a delegation of discretion to deny summary judgment. This ability constitutes a significant safeguard and plays a starring role in denials of summary judgment.

In contrast, the admonition to use caution when assessing possible summary judgment in selected types of cases—antitrust, negligence, civil rights, or employment discrimination—appears to be more of a "handle with care" slogan than a rule. In the hands of a judge who subscribes to this idea, the "be careful" admonition might prevent some improper applications of summary judgment. However, this is a "handle with care" or "fragile" label that can be affixed to a case and then fully ignored. The handle with care idea "is what it is"—more of a warning than a binding rule of law and, like most warnings, fully capable of disregard.

115. See *supra* notes 72-74.

The call for a “time-out” request by the non-movant is a more effective safeguard. It appears to be liberally granted and is readily available and operates in a manner to deter wrongful grants of summary judgment. This time-out procedure appropriately permits focused discovery to play a role in the summary judgment process and deters the possible movant tactic of a premature Rule 56 filing, before the non-movant has had the opportunity to discover critical facts. However, a future problem with the time-out request is that plaintiffs who face motions to dismiss governed by *Ashcroft v. Iqbal*¹¹⁶ are likely to seek a similar but unregulated time-out to seek discovery.¹¹⁷ Such motions might cause a similar Rule 56(f) request to appear redundant and to atrophy.

The axiom that courts weigh inferences in favor of the non-movant is easy to say but difficult to apply with certainty. Some say that all evidence is inferential, making it problematic to apply the notion. Moreover, this axiom has been made redundant by use of the directed verdict standard that now governs summary judgment mechanics. A court may weigh inferences in favor of the party moved against but should grant summary judgment whenever a reasonable jury could not find for the non-movant. Put simply, the notion of inference weighing appears to be trumped by other more substantial tenets governing summary judgment.

The use of *de novo* review supplies a useful deterrent to judges on the edge of granting a Rule 56 motion. The existing quantum of serious review deters careless grants of summary judgment. In this way, robust appellate review is a safeguard of some value as a way to mitigate excessive and wayward grants of summary judgment by trial courts. Nonetheless, the high cost of appeal and the long odds at achieving a reversal combine to diminish the admitted value of *de novo* review.

Lastly, Justice Rehnquist’s infamous and cryptic dictum in *Celotex* to exempt the non-movant from compliance with the Rules of Evidence plays a minimum role as a safeguard. The dictum suffers from a failure of authority and requires the district judge to predict whether an inadmissible piece of evidence can become admissible by trial. This crystal ball assessment is difficult to apply and corrupts a summary judgment process that needs accuracy and legitimacy, and that is advanced by the use of firm evidence norms.

116. 129 S. Ct. 1937 (2009).

117. See, e.g., Malveaux, *supra* note 79.

We are left with a helpful but short list of summary judgment “safeguards.” Legitimate aids exist to aid the trial court to assess and deny summary judgment. These include (1) the inherent and discretionary ability to find one issue of disputed fact, (2) robust *de novo* review, and (3) the Rule 56(f) request for a time-out pending discovery. I exclude some potentially attractive summary judgment clichés and maxims: (1) weighing inferences in favor of the non-moving party, (2) platitudes that motions for summary judgment be handled with care in civil rights, antitrust, and negligence litigation, and (3) the *Celotex* dictum that seemingly permits the non-movant to offer inadmissible evidence when combating a summary judgment motion. The latter three concepts each can play a role in assessing Rule 56 requests but should not be considered reliable safeguards capable of deterring misuse of summary judgment.